

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:) OTA Case No. 18011265
)
DONNA BOMARITO) Date Issued: June 26, 2018
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_____)

OPINION

Representing the Parties:

For Appellant: Donna Bomarito¹

For Respondent: Samantha Q. Nguyen, Tax Counsel

For Office of Tax Appeals: Josh Lambert, Tax Counsel

A. ROSAS, Administrative Law Judge: Pursuant to California Revenue and Taxation Code section 19324,² Donna Bomarito (“Appellant”) appeals an action by the Franchise Tax Board (“FTB” or “Respondent”), denying her claim for refund in the amount of \$925.54 for the 2014 tax year.

Appellant waived her right to an oral hearing, and therefore we decide this matter based on the written record.

ISSUES

1. Did Appellant establish that she qualifies for interest abatement?
2. Did Appellant establish that she qualifies for equitable relief?

¹ Although Appellant prepared her own Appeal Letter, the Tax Appeals Assistance Program at Golden Gate University School of Law subsequently provided assistance to Appellant. Xiaoxi Ma wrote Appellant’s Reply Brief, and Hugo Ortega wrote Appellant’s Reply Supplemental Brief.

² Unless otherwise indicated, statutory references are to the California Revenue and Taxation Code.

FACTUAL FINDINGS

1. During the 2014 tax year, Appellant had a self-directed Individual Retirement Account (IRA) valued at over half a million dollars. PENSICO Trust Company, LLC (PENSICO) was the custodian of Appellant's IRA.
2. Appellant filed a 2014 California Resident Income Tax Return (Form 540) on March 27, 2015. She reported California adjusted gross income of \$76,794.
3. Appellant received a notice from PENSICO dated July 24, 2015 (PENSICO Notice), which indicated PENSICO "recently learned the borrower, Sarena Traver, has become a disqualified party in relation to [Appellant's] IRA. Such circumstances raise concern about whether or not a prohibited transaction, as defined by Internal Revenue Code ('IRC') Section 4975, has occurred in [Appellant's] account."
4. In the PENSICO Notice, PENSICO requested that Appellant consult her tax advisor or tax attorney and provide PENSICO with an opinion letter by August 23, 2015, explaining why the situation referenced in the PENSICO Notice was not a prohibited transaction.³
5. Appellant received a letter from PENSICO dated October 14, 2015, which stated that PENSICO was resigning as custodian of Appellant's IRA, effective immediately. The letter indicated PENSICO was distributing the IRA assets, with a total distribution value of \$540,619.82, to Appellant personally.
6. With its letter dated October 14, 2015, PENSICO provided Appellant with a Form 1099-R for 2014 which reported a gross distribution, a taxable amount, and a California distribution of \$540,619.82 (boxes 1, 2a, and 14, respectively).
7. On October 15, 2015, Appellant filed a 2014 California Amended Individual Income Tax Return (Form 540X). She reported the IRA distribution of \$540,619.82 and a corrected California adjusted gross income amount of \$639,860. This resulted in a revised total California tax liability of \$64,807 and a balance due of \$60,636. Appellant paid the balance due. In an attachment to her Form 540X, Appellant explained she had a

³ There is no evidence in the record showing whether Appellant provided the requested opinion letter to PENSICO. But the PENSICO Notice indicated that if Appellant failed to provide the opinion letter by August 23, 2015, PENSICO may assume Appellant concluded the transaction at issue violated IRC section 4975, and PENSICO would resign as custodian of Appellant's account and distribute the IRA to Appellant personally. In fact, this is what occurred.

prohibited transaction within a self-directed IRA, which caused the entire value of her IRA to become taxable.

8. FTB issued a Notice of State Income Tax Due for an interest balance due of \$925.54.
9. Appellant remitted full payment in the sum of \$925.54 and wrote to FTB requesting that she “not be further penalized and the late charge be refunded.” FTB treated this as a claim for refund of the amount paid.
10. FTB sent Appellant a Notice of Action of the Franchise Tax Board upon Taxpayer’s Claim for Refund, denying Appellant’s request for interest abatement.
11. Appellant filed this timely appeal.⁴

DISCUSSION

Issue 1 - Did Appellant establish that she qualifies for interest abatement?

Tax is due on the original due date of the return without regard to an extension to file. (§ 18567.) If the tax is not paid by the original due date, or if FTB assesses additional tax, the law provides for charging interest on the balance due. (§ 19101.) The imposition of interest is mandatory, and FTB is not allowed to abate interest except where authorized by law. (*Appeal of Yamachi*, 77-SBE-095, June 28, 1977.) Interest is not a penalty; it is compensation for the use of money. (*Appeal of Jaegle*, 76-SBE-070, June 22, 1976.) For interest to be abated, Appellant must qualify under the provisions of Sections 19104, 19112, or 21012.

Section 19104 allows for the abatement of interest when the interest is attributable to any unreasonable error or delay by an officer or employee of FTB in performing a ministerial or managerial act. Those circumstances are neither alleged, nor shown, to be present here. There was no an error or delay by FTB. Rather, Appellant alleges that there was a delay by the custodian of her IRA in informing her of the prohibited transaction in her retirement account. Because interest abatement under Section 19104 is available only for any unreasonable error or delay committed by FTB, and not that of a third party, Appellant is not entitled to interest abatement under Section 19104.

Additionally, interest abatement is not available under Section 19112, as there is no evidence of extreme financial hardship caused by a significant disability or other catastrophic

⁴ Appellant filed this appeal with the Office of Tax Appeals’ predecessor-in-interest (the State Board of Equalization) on September 22, 2016.

circumstance.

Finally, interest abatement is not available under Section 21012 because FTB did not provide Appellant with any written advice upon which she detrimentally relied.

Therefore, Appellant is not entitled to interest abatement.

Issue 2 - Did Appellant establish that she qualifies for equitable relief?

Appellant claims she should receive a refund of the interest on account of unspecified “equitable principles.” She argues that unless the interest is refunded, “the government has received monies which in equity and good conscience belong to the taxpayer.” Appellant argues that she is being “penalized” and that she did not know of the prohibited transaction until after the close of the tax year.

The factual premises underlying Appellant’s claims are unsupported and without merit. As noted earlier, interest is not a penalty. Interest charges such as those imposed here constitute compensation for the use of money, rather than a penalty. (*Appeal of Jaegle, supra.*) Respondent is simply charging Appellant an interest amount because of her failure to pay tax when due. Furthermore, the relevant fact is not when Appellant was notified of the transaction, but that there was indeed a prohibited transaction in 2014; and as a result of that transaction, Appellant’s account stopped being an IRA as of the first day of that year.⁵

Moreover, although Appellant argues that the doctrine of equitable estoppel supports her refund claim, she fails to make an initial showing that, among other elements, she reasonably relied to her detriment on a misrepresentation by Respondent. (See generally *Appeal of Campbell, 79-SBE-035, Feb. 9, 1979.*)

Therefore, equitable estoppel principles do not bar Respondent’s action.

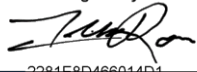
HOLDINGS

1. Appellant did not establish that she qualifies for interest abatement.
2. Appellant did not establish that she qualifies for equitable relief.


⁵ If an IRA owner or his or her beneficiary engages in a prohibited transaction in connection with an IRA at any time during the year, the account stops being an IRA as of the first day of that year. (IRC, § 408(e)(2)(A).)

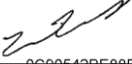
DISPOSITION

Respondent's action in denying Appellant's claim for refund is sustained in full.

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Alberto T. Rosas
Administrative Law Judge

We concur:

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Douglas Bramhall
Administrative Law Judge

DocuSigned by:

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Tommy Leung
Administrative Law Judge